Editor's note: 92 I.D. 383

TOMMY CARPENTER ET AL.

IBLA 83-632 Decided September 10, 1985

Appeal from a decision of the Director of the Lexington, Kentucky, Office of Surface Mining Reclamation and Enforcement, declining jurisdiction to regulate a crushing and loading facility.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite -- Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With -- Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." A crushing and loading facility operated in connection with a coal mine need not be located at or near such mine in order to be a surface coal mining operation within the meaning of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

APPEARANCES: Thomas J. Fitzgerald, Esq., Lexington, Kentucky, for appellants; Charles P. Gault, Esq., Knoxville, Tennessee, and Harold P. Quinn, Jr., Esq., Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Tommy Carpenter, Arnold Cates, Carl Cates, Merle Lakes, Delton Turner, Preston Alexander, and Madeline Alexander appeal from a decision of the Director of the Lexington, Kentucky, Office of Surface Mining Reclamation and Enforcement (OSM), dated April 14, 1983, stating that OSM could not assert jurisdiction to regulate the Triple A Coal Company (Triple A) crushing and loading facility at Bighill, Madison County, Kentucky, because the Director had found that this crushing and loading facility was not "at or near" the mine with which it shared common ownership. As such, the Director stated Triple A's facility was not within the scope of the surface coal mining operations that OSM was authorized to regulate.

OSM was asked to regulate Triple A by the owners of two occupied dwellings who charged that Triple A had violated section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(e) (1982), by constructing its operation within 300 feet of their dwellings without having obtained a waiver from them. That section states, inter alia, that no surface coal mining operations, except those which exist on the date of enactment of SMCRA, shall be permitted within 300 feet from any occupied dwelling, unless the prohibition is waived by the owner thereof. An evaluation of Triple A's facility was conducted on March 30, 1983, by representatives of OSM and the State.

The "at or near" test applied by the Director is part of the definition of "surface coal mining operations" appearing at section 701(28) of

SMCRA, 30 U.S.C. § 1291(28) (1982). That term is defined, in part, to mean:

> (A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site. [Emphasis supplied].

The relevant mine site for purposes of the "at or near" test is RSF Coal Reserves (RSF), an underground mining operation 15 miles away from Triple A.

In the appealed decision, the Director also concluded that the Triple A facility appeared to be conducted "in connection with" the RSF mine. This conclusion was a necessary finding for OSM to have asserted jurisdiction over Triple A. Like the "at or near" test, the "in connection with" requirement has a statutory origin. See underscored language in section 701(28)(A), supra. No issue has been raised by the Director's finding in this regard. In so finding, the Director appeared to rely on a field report, dated March 30, 1983, by OSM inspector Aubrey J. Taylor, containing statements that Triple A was owned, at least in part, by one Thomas J. Rhein. Rhein is listed as president of RSF, Taylor reported, and is listed as agent for both corporations with the Kentucky Division of Corporations. Relying on the information of Triple A's watchman, Taylor concluded that 50 percent of the coal at Triple A was received from RSF.

Inquiring into the substance of appellants' charge, Taylor found that Triple A's operation was within 300 feet of the dwellings of Carl Cates, Arnold Cates, Delton Turner, Merle Lakes, and Tommy Carpenter. None of these individuals had waived the provisions of section 522(e)(5), the inspector reported. Taylor further found that Cowbell Creek, into which the operation drained, was within 100 feet of Triple A. As noted above, the Director's conclusion that the Triple A facility "appeared" to be conducted "in connection with" the RSF mine was unchallenged in this appeal.

Appellants correctly pose the issue on appeal in this manner: Whether a coal crushing and loading facility which is operated "in connection with" a permitted underground mining operation must be "at or near the mine site" to be subject to regulation under 30 U.S.C. § 1291(28)(A) (1982). OSM, relying on Debord v. Watt, No. 82-99 (E.D. Ky. Sept. 29, 1982), concluded the answer to this question is yes. Appellants, relying on the identical case, say no. We agree with appellants for the reasons following.

In the Debord case, residents living within 300 feet of a crushing and loading facility sought judicial review of a decision 1/ rendered by the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) holding that such facility could be regulated by OSM only if it was both at or near a mine site and operated in connection therewith. In so holding, IBSMA affirmed a decision by the Administrative Law Judge, who had described the crushing

1/ Dinco Coal Sales, Inc., 4 IBSMA 35, 89 I.D. 113 (1982).

and loading facility there as a "tipple" that "processed" coal from a mine 25 miles away under common ownership.

The district court found IBSMA's holding to be clearly erroneous, citing Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981), a case that involved "a similar question of the Secretary's jurisdiction over an off-site tippling operation." Slip op. at 3. Shawnee, the district court noted, held that section 701(28) of SMCRA should be interpreted to encompass off-site processing operations because Congress intended that tippling operations fall within the Act's ambit. The district court described the operation near the Debords as a "coal processing facility * * * which crushes and loads coal." Slip op. at 1.

On review of the Debord case by the Court of Appeals for the Sixth Circuit, the court affirmed in part and reversed in part. It affirmed the district court in holding that "processing" tipples, as distinguished from "loading" facilities, need not be located "at or near the mine site" in order to be subject to the Secretary's jurisdiction. The district court was reversed, however, in its characterization of the tipple operation therein as "processing" and in its finding that the operation had been determined by the Secretary to be "in connection with" a surface coal mine. Debord v. Dinco Sales, Inc., No. 82-5617 (6th Cir. Mar. 15, 1984), reh'g denied, May 8, 1984.

OSM seeks to limit the impact of the Debord case by noting that the only activities performed by Triple A are the stockpiling, crushing, and loading of coal. The crushing of coal, in OSM's view, is performed merely to facilitate

loading and, therefore, Triple A should be viewed as being engaged only in the loading of coal. OSM further contends that Triple A does not clean, concentrate, or prepare coal, and hence its activities do not amount to "coal preparation or coal processing." These latter terms have been defined at 48 FR 20392, 20400 (May 5, 1983) to mean "the cleaning, concentrating, or other processing or preparation of coal in order to separate coal from its impurities." 30 CFR 701.5.

A similar distinction between a crushing and loading operation and one that prepares or processes coal was critical to a recent decision by this Board, Ann Lorentz Coal Co. v. OSM, 79 IBLA 34, 91 I.D. 108 (1984). An earlier decision, styled In re: Permanent Surface Mining Regulation Litigation No. 79-1144 (D.D.C. May 16, 1980), had held that the "at or near" phrase in section 701(28)(A) referred only to the loading of coal and not to the several other activities set forth therein, such as the processing or preparation of coal. Slip op. at 51-3. 2/ Thus, we said in Lorentz, that if a facility engages only in the loading of coal for interstate commerce, it is a "surface coal mining operation" if loading is conducted on the surface of lands in connection with a surface coal mine and the facility is located at or near the mine site. At the Lorentz tipple, coal was crushed and loaded into railroad cars for interstate commerce. Our decision described this facility as a "dry" tipple, where no washing or other processing of coal occurred. 79 IBLA at 40, 91 I.D. at 111. In Lorentz, we held that, despite the presence of crushing activities at the tipple, OSM had to satisfy both

2/ A similar conclusion had appeared in the preamble to the Department's regulations describing its permanent regulatory program. 44 FR 14902, 14915 (Mar. 13, 1979) (comment 8).

the "at or near" and the "in connection with" tests in order to regulate the Lorentz tipple.

Our holding in Lorentz was influenced by certain language appearing in the preamble to the Department's 1983 revision of its regulations:

> "Coal preparation" or "coal processing" has been defined to mean the cleaning, concentrating, or other processing or preparation of coal in order to separate coal from its impurities. Under this definition, coal loading, crushing, sizing and other such activities do not constitute coal processing or preparation unless they result in the separation of coal from its impurities. [Emphasis added.]

48 FR 20394 (May 5, 1983), quoted at 79 IBLA at 39 n.6, 91 I.D. at 111 n.6.

Regulations accompanying this preamble defined coal preparation, coal processing, and coal preparation plants by incorporating the notion that coal processing necessarily involves the separation of coal from its impurities. 30 CFR 701.5. These regulations were reviewed by District Judge Thomas A. Flannery in July 1984 and were held to be premised on a misreading of the statute. In re: Permanent Surface Mining Regulation Litigation [Surface Mining II - Round I], No. 79-1144 (D.D.C. July 6, 1984), slip. op. at 15-20. Judge Flannery cited with approval both Shawnee and Debord, and concluded that the Secretary had jurisdiction to regulate off-site facilities and processing plants. Id. at 17.

In particular, Judge Flannery noted that under the OSM definition of coal processing "loading, crushing, sizing and other similar activities would generally not be considered coal processing." Id. at 18. Thus,

Judge Flannery continued: "The Secretary would regulate these operations only at or near the mine site." Id. Judge Flannery concluded, however, that "[t]his analysis is contrary to this court's prior interpretation of Section 701(28)(A)." Id.

It should be noted that under the district court's earlier decision the phrase "at or near the mine site" had been limited in scope because it was interpreted as only modifying the "loading of coal." In promulgating the 1983 regulatory amendments, OSM accepted the court's rulings on this point. However, in examining the coverage of the Act insofar as it related to crushing and sizing, OSM independently considered whether such actions were covered under either "coal preparation" or "coal processing."

With respect to "coal preparation," OSM concluded that "Congress specifically excluded mere crushing and sizing," and that only crushing or sizing when performed for the purpose of removing impurities from coal would be covered under "coal preparation." See 48 FR 20395. Turning to "coal processing" OSM recognized that "physical processing" appeared in the statutory language but argued that it was part of a phrase which commenced with "in situ distillation or retorting." OSM argued that "in situ" modified each subsequent concept in that phrase because Congress intended that "retorting, leaching, or any other chemical or physical processing when conducted in situ would be a surface coal mining operation." Id. Thus, only where the crushing was in situ, or alternatively, where it was done to remove impurities, would it be regulated as constituting either coal preparation or coal processing. 3/

3/ It should also be noted that crushing and sizing may be regulated as a "support facility resulting from or incident to a regulated activity or as part of a regulated activity." 48 FR 20397 (May 5, 1983).

In his decision Judge Flannery rejected OSM's theory that in situ modified each subsequent concept in the phrase, expressly finding that "'in situ' modifies distillation or retorting, but not leaching or other chemical or physical processing." Surface Mining II - Round I, supra, slip. op. at 19. Effectively, therefore, Judge Flannery ruled that physical processing, such as crushing or sizing, need not be conducted in situ to be subject to regulation. Since the "at or near" test had already been held to apply only to the simple loading of coal, it is clear that where crushing occurred, whether or not in conjunction with loading, such activities were subject to the Act's provision so long as they were done "in connection with" a coal mine.

We find that Judge Flannery's opinion requires us to reconsider the basis of our holding in Lorentz. Henceforth, a loading facility where crushing or sizing is conducted may be regulated by OSM upon a showing that its activities are conducted "in connection with" a coal mine, without regard to the "at or near" test. This holding, we feel, is consistent with the Department's acknowledgement that "in some circumstances crushing and screening operations may have adverse water, air, and noise impacts." 48 FR 20396 (May 5, 1983). 4/ See also Reitz Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 83 IBLA 198, 202-203 (1984), a case involving a coal preparation plant which discussed the development of this rule in light of Judge Flannery's decision.

4/ See also OSM's conclusion in 1979 that the terms "physical processing" and "or other processing or preparation" are readily interpreted to include crushing and screening. 44 FR 14902, 14914 (Mar. 13, 1979) (comment 6).

As set forth above, since OSM found that the crushing and loading facility was used in connection with a surface coal mine, section 701(28)(A) and the case law construing it provide a solid basis for OSM's exercise of jurisdiction in the instant case. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director of the Lexington, Kentucky, Office of Surface Mining Reclamation and Enforcement, is reversed.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Franklin D. Arness
Administrative Judge